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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHERRY PATRICIA BEHLKE,

Defendant and Appellant.

G051398

(Super. Ct. No. 08NF1382)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Vickie L. Hix, Commissioner. Affirmed in part, reversed in part, and remanded with directions.

Andrea S. Bitar, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Sherry Patricia Behlke appeals from a resentencing order under the “Safe Neighborhoods and Schools Act” (Proposition 47). Defendant contends the court should not have imposed parole at all, or should have imposed a shorter period of parole. She also asserts the court should have applied her excess custody credits to the parole period, and should have reduced her restitution and parole revocation fines.

We conclude the court correctly imposed parole, and that defendant has forfeited her restitution and parole revocation fine claims. However, we agree the court should have applied her excess custody credits to the parole period, and should have ensured the parole period did not exceed the original sentence imposed. We reverse and remand for a determination of her excess custody credits and maximum parole period.

FACTS AND PROCEDURAL HISTORY

In July 2008, defendant pleaded guilty to petty theft with a prior and admitted she had served five prior prison terms. The court sentenced her to state prison for a term of three years, awarded her 54 days of presentence custody credits, and imposed a \$200 restitution fine and a \$200 parole revocation fine.

In January 2012, defendant was released from prison and placed on postrelease community supervision (PRCS). (Penal Code, § 3451, subd. (a); all further statutory references are to the Penal Code.) At that time, the Department of Corrections and Rehabilitation awarded her 512 additional custody credits.

In November 2014, the voters passed Proposition 47, which reclassified certain offenses from felonies to misdemeanors. Proposition 47 also enacted section 1170.18. Under subdivision (a), if the defendant is still serving a felony sentence, the defendant can have that sentence recalled and be given a misdemeanor sentence instead. Defendants who are resentenced are subject to one year of parole unless the court, in its discretion, waives the parole requirement. Under subdivision (f), if the defendant has completed her felony sentence, she can petition to have her felony redesignated a misdemeanor, and no parole period applies.

In January 2015, defendant filed an application to redesignate her felony theft conviction as a misdemeanor under section 1170.18, subdivision (f), or, in the alternative to recall that sentence under section 1170.18, subdivision (a). The court recalled defendant's sentence under subdivision (a) and sentenced her to 365 days in county jail, gave her 365 days credit for time served, and, over defendant's objection, imposed one year of parole. The court also "reimpose[d] any fines and fees that were previously imposed."

DISCUSSION

1. Defendant Was "Currently Serving a Sentence" Because She Was On PRCS.

Defendant first argues being on PRCS is not "currently serving a sentence" within the meaning of section 1170.18, subdivision (a). Citing rules of statutory interpretation and *People v. Nuckles* (2013) 56 Cal.4th 601, she claims the word "sentence" in the phrase "currently serving a sentence" excludes time spent on parole. Thus, she contends the court should not have imposed parole at all. We disagree.

In an opinion filed after the briefing was completed in this case, we resolved the issue and held that a defendant serving a term of PRCS is still serving a sentence under section 1170.18, subdivision (a). (*People v. Morales* (2015) 238 Cal.App.4th 42, 48 (*Morales*).) So the court here correctly imposed parole, after recalling defendant's felony sentence and giving her a misdemeanor sentence instead.

2. Defendant's Excess Custody Credits Must Be Applied To Reduce Her Parole Period.

Defendant also contends that to the extent her custody credits exceeded those applied to the 365 day county jail sentence, the court should have applied those excess credits to the parole period imposed.¹ We agree.

¹ Defendant also contended the court miscalculated her custody credits, but now agrees the issue is moot. At defendant's request while this appeal was pending, the court amended the abstract of judgment to correctly reflect 611 days of custody credit.

As we explained in *Morales*: “As a general rule, excess custody credits (referred to as *Sosa* credits)^[2] reduce parole. [Citation.] And as defendant also notes, section 1170.18, subdivision (m), states, ‘Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.’ [¶] . . . ‘We must assume that the voters had in mind existing law when they enacted Proposition’ 47. [Citation.] There is no clear indication the voters intended to change the law on this front; to the contrary, they expressly retained all ‘otherwise available’ remedies. (§ 1170.18, subd. (m).) [¶] . . . And we do not find this result to be so absurd as to warrant a departure from a straightforward interpretation of the language of section 1170.18. The result we reach is not so unusual: all felons are intended to be subject to postrelease supervision as a general rule (§ 3000), yet if they have excess custody credits they are entitled to reduce or even eliminate their parole (§ 2900.5, subds.(a), (c)).” (*Morales*, *supra*, 238 Cal.App.4th at pp. 49-50.)

In their respondent’s brief in this case the People raised a host of arguments against the application of *Sosa* credits in this context, but we addressed and rejected all of these arguments in *Morales*. At oral argument the People relied on two recent opinions from the Court of Appeal, Second Appellate District, Division Six, both of which reached the opposite result and concluded *Sosa* credits do not apply to parole under section 1170.18. (*People v. Hickman* (2015) 237 Cal.App.4th 984 (*Hickman*); *People v. McCoy* (Aug. 12, 2015, B260449) __ Cal.App.4th __ [2015 Cal.App. Lexis 693] (*McCoy*).)

We explained in *Morales* why we believe the authorities cited in *Hickman* are inapplicable, and why we find the analysis in *Hickman* unpersuasive. *McCoy* reiterated the *Hickman* arguments and added little of substance. But our views on these issues are unchanged. Accordingly, we respectfully disagree with *Hickman* and *McCoy*.

² *In re Sosa* (1980) 102 Cal.App.3d 1002, 1006 (*Sosa*).

We have one final observation. The *McCoy* court said: “If the analogy to traditional parole is apt and *People v. Morales* is correct, then the purpose of parole, as expressed in section 3000 subdivision (a) (*l*), is defeated. This section provides: ‘ . . . the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision . . . to assist parolees in the transition between imprisonment and discharge.’” (*McCoy, supra*, __ Cal.App.4th at p. __ [2015 Cal.App. Lexis 693].)

The same line of reasoning was rejected in *Sosa* itself, where the court stated: “The Attorney General correctly points out that the parole is intended to assist the reintegration of the offender into society, both for his benefit and for the public safety during the critical period immediately following incarceration (see § 3000, subd. (a)); and to cancel that valuable program as a tradeoff for presentence confinement deprives both the offender and the public of a potentially valuable service. The same observation may be made with respect to many of the consequences of section 2900.5. Nevertheless the Legislature has seen fit to require that credit be given for presentence custody of any nature, as a reduction of postsentence confinement irrespective of the nature or purpose of the latter. That being the purpose and effect of the statutory credit system, it must be applied in the present situation also.” (*Sosa, supra*, 102 Cal.App.3d at p. 1006.)

3. Defendant’s Parole Period Cannot Extend Beyond Her PRCS Period.

Defendant also contends the court’s imposition of a parole period extending beyond the expiration of her PRCS period violated section 1170.18, subdivision (e), which states, “Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.” The Attorney General asserts imposition of the additional one-year misdemeanor parole period, on top of whatever felony sentence defendant had already served, is in keeping with the will of the voters in passing Proposition 47 and is consistent with their intent in enacting section 1170.18.

We agree with defendant. In another opinion filed after the briefing was completed in this case, we held that “the word ‘term’ in subdivision (e) [refers] to either a term of jail or a term of parole, such that the court may not impose a parole term that exceeds the scheduled end date of the defendant’s PRCS.” (*People v. Pinon* (2015) 238 Cal.App.4th 1232, 1238 (*Pinon*)). Hence, if the one-year parole period imposed here extended beyond the scheduled end date of defendant’s PRCS, then the court erred.

The one-year parole period was imposed by the court on January 28, 2015, so it would extend through January 27, 2016. At the hearing, defendant’s trial counsel represented to the court that her PRCS was scheduled to end on May 27, 2015, and her appellate counsel has repeated that representation in her briefing on appeal. But the record before us does not substantiate those representations.³

For all of these reasons here, as in *Pinon*, we will remand, “for the trial court to adjust defendant’s maximum parole date to correspond to the scheduled conclusion of defendant’s PRCS.” (*Pinon, supra*, 238 Cal.App.4th at p. 1238.)

4. Defendant Forfeited Her Objection To The Restitution And Parole Revocation Fines.

Defendant contends the court should have reduced her restitution (§ 1202.4, subd. (b)) and parole revocation (§ 1202.45) fines. Defendant committed her offense in March 2008, and on both fines the court imposed the \$200 statutory minimum for a felony committed that year. Defendant claims her fines must be reduced to the \$100 statutory minimum for a misdemeanor committed that year. She also claims the court’s error amounts to an unauthorized sentence. But as we said in *Morales*, “the maximum fine was \$1,000, even for a misdemeanor [citation], and thus the fines were not an unauthorized sentence. Defendant failed to object below and has thus forfeited the issue.” (*Morales, supra*, 238 Cal.App.4th at p. 52, fn. 4.)

³ We grant defendant’s request for judicial notice of her Department of Corrections and Rehabilitation Form 112.

DISPOSITION

The portion of the postjudgment order reducing defendant's felony to a misdemeanor is affirmed. The portion of the postjudgment order imposing a one-year parole period and denying defendant's *Sosa* credits is reversed, and the matter is remanded for the trial court to determine and apply her *Sosa* credits and to calculate her maximum parole period as follows:

1. Impose the one-year parole period.
2. Determine and apply defendant's *Sosa* credits to reduce the one-year parole period.
3. Determine whether the reduced parole period extends beyond the date on which defendant's PRCS period would have expired and, if so, then further reduce the parole period so it ends no later than the date on which her PRCS period would have expired.
4. If either of the reductions in paragraphs 2 or 3 leave no remaining parole period, then the one-year parole period shall be deemed to have been served.

In all other respects, the postjudgment order is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.